Supreme Court, U.S.
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No. 93-____

In The
Supreme Court of the United States
October Term, 1993

JOE JUNIOR COWAN,
Petitioner,

vs.

THE STATE OF MONTANA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

WILLIAM BOGGS
PO Box 7881
Missoula, MT. 59807
(406) 728-3088
Counsel of Record for Petitioner

MARGARET BORG
Chief Public Defender,
Missoula County
317 Woody Street
Missoula, MT. 59802
(406) 721-5700
Counsel for Petitioner

142 P

QUESTIONS PRESENTED

Joe Cowan, an oft-diagnosed paranoid schizophrenic, committed a serious assault while in the throes of psychotic delusion. Because Montana has, by law, abolished the insanity defense, evidence clearly establishing his mental nonresponsibility for the assault, while admitted, was disregarded, and Mr. Cowan was sentenced to serve 60 years in prison for attempted murder.

Evidence respecting Mr. Cowan's mental illness, as well as his deranged behavior, was admitted at trial on the question whether he committed the assault "deliberately." However, by Montana statute, knowledge or purpose is presumed, in a case of attempted murder, from the acts, unless rebutted by evidence showing "justification or excuse."

These facts present the following questions:

1. Do either or both the due process, or the cruel and unusual punishment, clauses of the Constitution protect an insane person from suffering criminal conviction and punishment for acts over which he has no moral control?

2. Does a legal inference of purpose from conduct, combined with abolition of the insanity defense, create a burden-shifting or conclusive presumption of intent, in contravention of the doctrine enunciated by this Court in *Sandstrom v Montana?*

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In the
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JOE JUNIOR COWAN,
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vs.

THE STATE OF MONTANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Petitioner, Joe Junior Cowan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding October 6, 1993, and from which rehearing was denied on November 4, 1993.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 861 P.2d 884 (Mont. 1993). The denial of the petition for rehearing was not reported. The opinion and denial of the petition for rehearing are reproduced in Appendices A and D.

JURISDICTION

The judgment of the Montana Supreme Court was entered on October 6, 1993. A timely petition for rehearing was denied on November 4, 1993. This petition for certiorari is filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this

Court is invoked under the provisions of 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Eighth Amendment to the United States Constitution, which provides in pertinent part:

...cruel and unusual punishments...shall not...be inflicted...

The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

No State shall...deprive any person of life, liberty, or property, without due process of law...

Section 45-5-112, Montana Code Annotated, which provides:

In a deliberate homicide prosecution, knowledge or purpose may be inferred from the fact that the accused committed a homicide, and no circumstances of mitigation, excuse, or justification appear.

Section 46-14-102, Montana Code Annotated, which provides in pertinent part:

Evidence that the defendant suffered from a mental disease...is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.

Section 46-14-311, Montana Code Annotated, which provides:

Whenever a defendant is convicted on a verdict or a plea of guilty and he claims that at the time of the commision of the offense of which he was convicted he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or conform his conduct to the requirements of the law, the sentencing court shall consider any relevant evidence presented at the trial and shall require such additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report thereof as provided in 46-14-202 and 46-14-203.

STATEMENT OF THE CASE

Rule 14.1(g) Statement

Shortly before 7:00 p.m. on the evening of April 24, 1990, Maggie Doherty, a US Forest Service employee, returned to her residence quarters at the Lolo Work Center located in a remote section of Missoula County, Montana. Upon arriving home, she noticed that her television was on, and that her front door was unlocked, though she had left it locked when she went to work the previous day. Upon inspecting the interior of the house, she discovered that it appeared that someone had been lying on the couch in the living room, and that some of the food in the kitchen had been prepared and eaten. Also, there was a Forest Service pack and jacket on the floor, which she had not left there.

Somewhat alarmed, Ms. Doherty placed several calls to Forest Service personnel, during one of which she believed she heard someone listening in on one of the Work Center phone extensions. She informed whomever

was on the line that she was calling the police, and proceeded to do so.

As Ms. Doherty spoke with 911, she saw a man she had never seen before emerge from a nearby building. She was immediately struck by the unnatural and fearsome intensity of his facial expression, which she later described as "mad". At this point, she locked the doors and windows, and armed herself with her 12-gauge pump shotgun, which she loaded with the only ammunition at hand—blank shells.

The man went back and forth around the residence, trying the locked doors and looking in the windows. At several points, Ms. Doherty and he looked at one another directly through the window, and the man saw Ms. Doherty talking on the phone with 911, and holding her shotgun at the ready. At other moments, she yelled at him, inquiring what he wanted, and he either made no response or, at one point, responded "society bitch" and "mechanic robot bitch"—as he continued to circle around the house "like a wild animal." She also heard him "mumbling and yelling" things like, "it's my house," and "who are you?" and mimicking her in a bizarre fashion. Then Ms. Doherty looked out and saw him kicking at her car and trying to tear the license plate off it with his bare hands.

This phase of the encounter lasted for 15-20 minutes, during all of which time Ms. Doherty remained — as the intruder knew — on the phone with the police,[1] and armed with an apparently deadly weapon.

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[1] The delay in the emergency response to Ms. Doherty's call was attributable to the fact the nearest patrol car at dispatch was 18 miles from the Work Center — something defendant could not have surmised, since the previous evening he had been questioned by a deputy in the vicinity of the Work Center.

The man disappeared, and shortly returned carrying a hodag (an adze-like tree-planting tool). Ms. Doherty saw him as he came back in the direction of the residence and noted on his face an "angry, serious" look which terrified her in its fixity and intensity.

The man struck at the lock on the door with the hodag, eventually shattering it. He then came toward Ms. Doherty across the entire length of the house, with the hodag raised in an unnatural, "almost mechanical" but terrifying manner, "up in the air like a baseball bat." He never hesitated, although she had the shotgun leveled at him the entire time, and pulled the trigger as he approached within a few feet of her.

The shotgun misfired, and the man—without saying anything further—assaulted Ms. Doherty with the hodag. Although she tried to fend him off, for a while using the shotgun to parry the blows, he struck her repeatedly with the implement about the head, arms, and shoulders, until she eventually fell, semi-conscious and helpless, to the floor by the door.

The responding officers found Ms. Doherty lying badly injured by the door. They found the Petitioner, Mr. Cowan, standing near the mess hall. When confronted by the officers at gunpoint, Mr. Cowan ran around to the back of the mess hall, saying "something about getting a backpack." When the officers gave chase "expecting to see him running for the trees," they found him standing next to the building with the backpack, where he quietly surrendered.[2] The hodag was later found lying in the

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[2] Why Mr. Cowan risked being shot in order to retrieve his "new" backpack — a fairly flimsy and inexpensive item of Forest Service gear — can only be understood in light of the testimony of the Missoula County Sheriff's deputy who had questioned Mr. Cowan the previous evening. According to that deputy, Mr. Cowan had attracted his attention as he walked in the rain near the Lolo Work Center — carrying his belongings in a plastic garbage bag.

grass in plain view between the residence and the mess hall.

Describing her impressions of Mr. Cowan's conduct months later at trial, Ms. Doherty was asked:

> Q: What did you make of that behavior?
> A: I don't know, I didn't know at the time.
> Q: Did it make any sense to you at the time?
> A: Nothing did that whole night ...no.

Between his arrest and trial, Mr. Cowan underwent mental health evaluations by five different professionals, including a psychiatrist and a clinical psychologist retained by the State, a psychiatrist and a clinical psychologist retained by the Defense, and a staff psychiatrist at Warm Springs State Hospital appointed by the Court. Each of these professionals found Mr. Cowan to be seriously mentally ill, suffering from a psychiatric disorder each identified as Schizophrenia, paranoid type.[3] This diagnosis was consistent with that rendered over the years by numerous mental health institutions located in Mr. Cowan's home state of North Carolina.

Each of the psychiatric professionals found, more specifically, that Mr. Cowan suffered from:

(1) an inability to understand and deal with reality;

(2) paranoia, that is, irrational feelings of persecution and terror;

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[3] The severity of the disorder was such that on September 7, 1990, the Defendant was found to be mentally incompetent to stand trial, and was committed to the State psychiatric facility. Ninety days later, after undergoing an intensive course of psychotropic medication, Mr. Cowan was determined to be competent to stand trial (see Appendix I).

For a comprehensive clinical description of schizophrenia, see Appendix K.

(3) hallucinations;

(4) ideas of reference;

(5) a delusional belief system;

(6) disorganized and incoherent thought and speech;

(7) vulnerability to impulsive loss of control and disintegration of emotional controls.

One of the relevant features of Mr. Cowan's delusional belief system, not uncommon in cases of schizophrenia, was found to be a conviction that many of the human beings in his environment were in fact robots, acting with evil purpose.

At trial, three of the mental health professionals who were called as witnesses attempted to describe the effect of the complex thought disorder underlying schizophrenia on the emotions, actions, and conduct of the mentally-ill person. According to Defense psychiatrist Noell Hoell, M.D.:

> "It is an altered or abnormal state of mind in which an individual's ability to understand and deal with reality is significantly impaired, either because of hallucinations, delusions, misinterpreting events, inability to reason — a mood state that leads one to false conclusions in such a way, one's ability to deal with the environment in a reasonable way is impaired."

According to Defense psychologist Robert Shea:

> "A person is suffering from a form of disorder where thinking and reality testing is extremely distorted. A person has a very difficult time distinguishing between what is real and what is fanciful."

According to prosecution psychologist Herman Walters:

> "In general the presence of a delusion provides false assumptions, false premises, on which the individual then acts. The acts are likely to be consistent with the delusions, but to outward appearances bizarre or unacceptable or strange, because we don't know the premises and we don't make the connection that they do..."

Drs. Hoell and Shea testified that in their opinion, Mr. Cowan was in the throes of an intense "psychotic delusional process" when he attacked Ms. Doherty on April 24, 1990. Each testified that this had been established "to a reasonable scientific certainty." In a report filed with the Court, experienced prosecution forensic psychiatrist William Stratford, M.D., opined that "it is much more likely than not that Mr. Cowan was functioning in his delusional system at the time of the criminal conduct..." [Appendix H]. The prosecution psychologist, Dr. Walters, testified that the Defendant "may have been" in a delusional or psychotic state at the time of the incident. He explained:

> "The presence of his disorder, his history of it, plus that kind of behavior certainly raised the possibility of psychosis at that time, but I don't have a way of establishing with any conviction whether he was or not..."

He had no way, he then explained, because, in his opinion, no mental health professional could ever reconstruct an individual's past state of mind with any degree of accuracy.

Each of the three psychiatric professionals who

appeared at trial testified that there existed virtually no possibility that Mr. Cowan was "malingering" or "faking" his mental illness. The prosecution clinical psychologist was particularly unequivocal on this point [see Appendix J].

Each of the psychiatric professionals who appeared at trial testified that if an individual suffering from paranoid schizophrenia was in a condition of severe psychotic disruption at the time of an assault, such a person's ability to appreciate the criminality of conduct or conform it to law would be substantially impaired. Two of these witnesses were sure the defendant was in such a condition on April 24, 1990; the third was uncertain. In addition, prosecution psychiatrist Stratford also found that Mr. Cowan's ability to appreciate the criminality of his conduct at the time of the assault was "certainly limited but not absent as a result of his mental disease."

There was no evidence offered at trial which tended to contradict the thesis — established by both eye witness and expert medical testimony — that the acts of the defendant during the assault were those of a madman.[4] Nevertheless, all the professionals who participated in evaluating Mr. Cowan were clear that he, like

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[4] The State did, as is customary in such cases, put on testimony tending to show that, at times, Petitioner Cowan could present himself fairly normally. This, of course, in no way contradicted the hypothesis that the assault was a product of psychosis. As explained in the report issued by the State Mental Hospital:

> "When the symptoms of this disorder are not well controlled with appropriate treatment he experiences significant disruption in reality contact. Records document his having experienced auditory hallucinations, visual hallucinations, ideas of reference, and extensive paranoid delusions. It is interesting to note that the severity of these symptoms varies quite a bit

all schizophrenics, possessed at least the *capacity* to act "purposely and knowingly" in some rudimentary sense of the words. As prosecution psychiatrist Stratford put it: "it is my professional opinion that a person can act knowingly and purposely, and still be functioning in a psychotic or delusional world." As to whether Mr. Cowan did act, in some sense, with purpose or knowledge during the actual assault, there was disagreement among the professional witnesses, largely based on their different understandings of what it might mean to characterize acts stemming from palpable mental derangement as "deliberate" acts.

Rule 14.1(h) Statement

As a result of the assault on Maggie Doherty, Petitioner Cowan was charged with the offenses of attempted deliberate homicide and aggravated burglary.[5] Having waived a jury, Mr. Cowan was tried before

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> over time. Records indicate that Mr. Cowan can appear perfectly normal at times, while at other times he appears to be in an obviously psychotic state. Such variation in the intensity of psychotic symptoms is not unusual in an individual diagnosed as suffering from Paranoid Schizophrenia. It also appears likely that Mr. Cowan is a reasonably intelligent individual who is somewhat reluctant to reveal the symptoms of his mental illness. Thus, when his symptoms are under reasonably good control he appears able to "cover" his illness by not revealing his delusional thoughts. It is quite likely, however, that his underlying delusional beliefs persist even when the more overt signs of his mental illness are not readily apparent." [Appendix I]

[5] The burglary count, based on unpermitted entry into an occupied structure, was essentially duplicitous. Since the sentence based on petitioner's conviction on this count runs concurrently with his primary sentence, and the defense — insanity — would be the same, the burglary count is treated herein as presenting identical issues with the charge of attempted murder.

the Court on December 17-20, 1990. Pursuant to a defense Notice of Intent[6] filed before trial, the only issue at trial was whether Defendant should be acquitted by reason of insanity. Because insanity as an independent defense was abolished by the Montana legislature in 1979, the only statutory grounds for an insanity acquittal would be if defendant were shown to lack the capacity to act deliberately, that is, knowingly and purposely.[7] Nevertheless, a copious quantity of eyewitness and psychiatric evidence that would have been relevant to establishing a traditional insanity defense was admitted at trial, with virtually no evidence being excluded on grounds of relevancy. At the close of the evidence, the Defense presented the Court with a lengthy Memorandum of Law challenging, in various respects, the constitutionality of the Montana statutory scheme governing the handling of mental illness in a criminal context. In particular, the defendant argued that the due process and/or cruel-and-unusual-punishment clause of the US Constitution guaranteed him the right to an acquittal based on the affirmative defense of mental disease or defect excluding responsibility, articulated in some traditionally-recognized form, such as the M'Naghten test or the ALI Model Penal Code formulation.[8] [See Defense Memo, Appendix E].

On December 20, 1990, in a bench ruling an-

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[6] Although Montana has abolished the insanity defense, the defendant is still required by statute to give pre-trial notice of intent to rely upon mental disease to disprove criminal state of mind. Section 46-15-323(3), MCA.

[7] Section 46-14-214 MCA provides that "when the defendant is found not guilty... for the reason that due to a mental disease... the defendant did not have a particular state of mind... that is an element of the offense, the verdict must [so] state."

[8] ALI-MPC Section 4.01 provides:

"A person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

nounced immediately after reviewing the Defense Memorandum of Law, the Court found Petitioner Cowan guilty.

On January 28, 1991, the Defense filed a Motion to Set Aside the Verdict, together with a Brief. In this document, the issue was raised of whether a conclusive or burden-shifting presumption was operating to preclude *any* insanity-based acquittal under the Montana statutory scheme. [See Motion, Appendix F].

On February 12, 1991, the Court promulgated Findings of Fact and Conclusions of Law drafted by the prosecutor. [Appendix B].

On February 13, 1991, the Defendant was sentenced to serve 60 years in the Montana State Prison. [Judgment, Appendix C].

On appeal to the Montana Supreme Court, the Defendant argued, among other things, that his conviction violated: (1) his federal constitutional right to assert an independent, affirmative defense of insanity; and (2) his *Sandstrom* due process right not to have criminal intent presumed from his acts. Without relying on the trial court's fact-finding, the Montana Supreme Court, in a 5-2 decision, specifically held: (1) that neither the Eighth nor Fourteenth Amendments of the US Constitution conferred any right on a criminal defendant to assert an affirmative defense of insanity; (2) that the challenged presumption permitted, but did not require, intent to be presumed from acts. A lengthy dissent took the position that Montana's abolition of the insanity defense did violate the due process clause.

REASONS FOR GRANTING THE WRIT

I. This case presents, in an ideal factual setting, an important question of federal law that has not been, but should be, settled by this Court: is the insanity defense, in some form, required by the US Constitution to be made available to a criminal defendant in a state court felony proceeding?

"Joe Cowan is certifiably insane, and it was uncontroverted that at the time of the acts with which he was charged he did not understand that his conduct was wrong." *State v Cowan*, 861 P.2d 884, 894 (Mont. 1993) (Justice Trieweiler, dissenting). Yet, because the defense of insanity has been abolished in Montana, Joe Cowan was convicted and sentenced to be incarcerated in the Montana State Prison for 60 years. At the trial level and on appeal, Mr. Cowan continuously and expressly asserted a right grounded in the US Constitution not to suffer the stigma of conviction and the cruelty of punishment for acts which he could, and did, demonstrate were committed without normal awareness and moral culpability on his part. The Montana Supreme Court, directly confronting the issue raised by these circumstances, determined that neither the Fifth nor the Eighth Amendments of the US Constitution (as applied to the States by the Fourteenth) required that the defense of insanity be available to a State criminal defendant. In so deciding, the Montana Court relied on the absence of any direct authoritative precedent on this question from the US Supreme Court.

This case presents an ideal vehicle for settling a question which has remained vivid but unanswered for four decades, ever since *Leland v Oregon*, 343 U.S. 790 (1952). In that case, this Court held that the formulation of the relevant test of criminal insanity, as well as the

allocation of the burden of proof on insanity, were matters within the province of the state legislatures. Some have taken this to mean that states are free also to deny the defense altogether to persons charged with serious crimes.[9] Others read *Leland*, on the contrary, as standing for "the proposition that the insanity defense, in some formulation, *is* required by due process," *People v Skinner*, 704 P.2d 752, 758 (Cal. 1985). See also, *State v Searcy*, 798 P.2d 914, 922-926 (Idaho, 1990) (Justice McDevitt, dissenting).

The matter has come to a head in recent years because three States—Montana, Idaho, and Utah — have by legislative action eliminated mental nonresponsibility as an independent, exculpatory doctrine in their criminal law. This, combined with Congress' highly publicized consideration of similar legislation, has occasioned much discussion of the place of the insanity defense in the American system of criminal justice. Commentators have not been shy in suggesting that the question of its constitutional status is a crucial one, begging resolution by this Court, nor that the resolution should or would be in the direction of finding the insanity defense "fundamental" to the Anglo-American criminal process. See, generally, ABA Criminal Justice Mental Health Standards, Commentary to Section 7-6.1 [reprinted as Appendix L]; Robitscher and Haynes, "In Defense of the Insanity Defense," 31 Emory L.J. 9, 51-59 (1982); "The Proposed Federal Insanity Defense," 22 Amer. Crim. L. Rev. 49, 57-63 (1984); Wales, "An Analysis of the Proposal to Abolish the Insanity Defense," 124 U.Pa. L. Rev. 687, 702-704 (1976).

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[9] A view to some extent supported by this Court's decision in *Rivera v Delaware*, 429 U.S. 877 (1976), which seemed to imply that sanity was not a fundamental component of criminal responsibility.

If the matter of the constitutional status of the insanity defense is to be decided, it should be in a case where the defendant is clearly insane. Best would be a case where the condition of insanity which produced the criminal acts

> "is well-defined and beyond controversial interpretation; i.e. a condition in which the sense of reality is crudely impaired—for example, when people are confused or disoriented or suffer from hallucinations or delusions ... as ... in schizophrenia..."
>
> —Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 U.Pa.L. Rev., 378, 384 (1952).

As pointed out by Abraham Goldstein in his definitive treatise The Insanity Defense, schizophrenia is the "core" mental disease leading to or requiring the insanity defense, for it produces the archetypal set of symptoms raising doubt as to the moral significance of the defendant's harmful acts: "breakdown of intellect, serious loss of self-control, loss of a sense of reality ... symptoms which may appear in the form of delusions, hallucinations, disorientation, assaultive behavior, or extreme withdrawal".[10]

Joe Cowan's case fits precisely within the pure psychiatric model. As summarized by Montana Supreme Court Justice Trieweiler:

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[10] Goldstein, The Insanity Defense (Yale, 1967), 25. Interestingly, Goldstein believes a violent, apparently motiveless, random assault committed by a paranoid schizophrenic and by him justified vaguely, but wholly irrationally, as self-defense, represents the quintessential situation in which a finding that the criminal acts were *directly* caused by the mental disease is most reliable, *op. cit.*, 33. This sort of irrational self-defense justification was advanced privately by Petitioner Cowan: see Appendices G, H, and I herein.

"The behavior of defendant ... was nothing less than bizarre and irrational ... throughout ... Everyone who examined defendant concluded he was suffering from paranoid schizophrenia ... defendant was in a psychotic state at the time he attacked the victim ... In that state, he could not understand or deal with reality because of delusions and misinterpretation of events ... he could make a decision about what he was doing within his own sense of reality ... but at the same time, would not be able to understand the real implications of his conduct because of the delusions under which he acted... There was no testimony from any witness to controvert the expert medical opinion that, because of serious mental disease, the defendant was unable to appreciate the criminality of his conduct at the time he assaulted the victim ... The result in this case is the worst case scenario anticipated by national critics of Montana's insanity law..." [11]

—*State v Cowan, supra,* 861 P.2d at 890-92 (Trieweiler, dissenting)

If the matter of the constitutional status of the insanity defense is to be decided, it should be decided, also, in a case where the ultimate holding can be as limited as possible. This is because a decision that the defense is required by the Constitution, for example, results inevitably in mandating some national uniformity in the criminal law. Nearly everyone agrees that this

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[11] One of those critics was prosecution psychiatrist William Stratford, who, in his psychiatric report to the court on Joe Cowan, characterized Montana's abolition of the insanity defense as "infamous" (Appendix H).

result is in itself undesirable, and that the interests of federalism, the public welfare, and the rights of individual citizens are probably best advanced in the long run by encouraging a maximum degree of innovation and experimentation in the criminal justice systems of the various states. The exception to this rule may perhaps be found in innovation and experimentation which has the effect of eliminating one or more of the most basic structural features of the Anglo-American regime of criminal jurisprudence. These features, which are both time-honored and time-tested, may indeed be thought to be indispensable in order that a criminal justice system patterned as ours is, function in a manner that remains "fundamentally fair."[12] Such a conclusion, sparingly applied, still leaves the states ample room for social experiment within a stable skeleton of concepts inherited from the common law.

Joe Cowan's case comes to this Court in an ideal posture in this regard also. The issue it raises is as basic and narrow as possible: can the insanity defense be eliminated *altogether* by the states? Can our traditional concept of criminal culpability, with its attendant liability for radical personal stigma and maximum loss of liberty, dispense altogether with the core sanity of the actor as a premise? Because both Cowan's disease and his resulting conduct were so extreme, a holding that he should have had the chance to avoid criminal liability on account of mental nonresponsibility, would still leave the states great flexibility in the methods and standards used in making that determination, as well as wide latitude in dealing with the degrees and consequences of mental illness in a criminal justice context. At the same time, it would discourage that form of innovation which responds to the ever-present temptation to "solve" social

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[12] See, Wales, *supra*, 124 U.Pa.L.Rev. at 689; 691; 702-704

problems by an unfortunate lapse into barbarism.[13]

II. Although this Court has recently hinted that an insanity defense is not constitutionally required, the issue should be directly confronted; for abolishing the defense in fact jeopardizes some central values of our free society.

In a number of dicta in recent years, members of this Court have suggested that the availability of the insanity defense is not guaranteed by the United States Constitution. As early as 1985, the now Chief Justice stated "It is highly doubtful that due process requires a state to make available an insanity defense to a criminal defendant," *Ake v Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, dissenting). In 1992, Justice O'Conner, in a concurrence specifically written to emphasize the point, explains that a case holding "does not indicate that states must make the insanity defense available," *Foucha v Louisiana*, 112 S.Ct. 1780, 1790 (1992) (O'Conner concurring). In the same case, Justice Kennedy notes that "It is well accepted that the states may define their own crimes and defenses," *Foucha supra*, 112 S.Ct. at 1795 (Kennedy, dissenting)—and then approvingly cites Montana's abolition of the insanity defense as an example of the proper exercise of State autonomy in this regard.

If these individual opinions state the law of the land,[14] it is incumbent on this Court to say so—specifically, unequivocally and in the context of a proper case. This is because the insanity defense (not to mention all

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[13] *Robinson v California*, 370 U.S. 660, 676 (1962) (Justice Douglas, concurring in judgment): development of the insanity defense represents "the revulsion of civilized man against barbarous acts."

[14] They may not; ironically, all of these dicta were offered in cases where the actual holdings tended to underline the jurisprudential importance of the insanity defense.

other "crimes and defenses"[15]) supports and is inseparably linked to some pretty ancient and fundamental values of our free society.

The first and most obvious of these values is that of enlightened social conduct, which is usually thought to include the humane treatment of the unfortunate, the mysteriously accursed.[16] As a preeminent student of the insanity defense pointed out, when the defense is asserted, it calls upon a jury—"speaking as surrogate for the community and the victim—to decide whether the person accused of crime is to be condemned as a criminal or regarded compassionately as insane."[17] The social basis of the defense is the notion of *blame*—the notion that "only the evil man, the one who intended to cause the injury, deserves to be punished"[18]—in contrast to one who is mentally ill, and who, as a consequence, cannot help what he does, and is pitiful. The defense is said to have developed very early under the aegis of the King's Peace, which, by institutionally invoking the sanctions of death or imprisonment for antisocial conduct, "was designed to channel the anger of victims and their friends lest they seek personal revenge" for crime.

> "A corollary of this, however, was the feeling that so serious a sanction ought not to be imposed in situations in which the initial impulse to anger was likely to give way, even among victims, to feelings of compassion. These were situations in which the offender seemed so obviously different from most men that he could not be blamed for what he had done"[19]

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[15] *Foucha, supra*, 112 S.Ct. at 1789-90; 1794-95; 1809.
[16] *Robinson v California*, 370 U.S. 660, 666-67; 676 (1962)
[17] Goldstein, The Insanity Defense, *supra*, 3, 12
[18] *Id.*, 10.
[19] *Id.*, 12.

The passage of time has in no way, presumably, tended to diminish the general conviction inherited from the rudimentary stages of the development of civilized sensibility, that the blameless ought not to be punished. What it has done, however, is to make clearer that the adherence to this principle may possess some unlooked-for social utility, beyond that which is intrinsic to all collective exercises of compassion. This utility is chiefly located in the tendency of the insanity defense continually to reinforce the validity of the core concept of the moral responsibility of the individual, thus enhancing both the order, and the liberty, which go to compose "a scheme of ordered liberty."[20]

The concept of moral responsibility enhances liberty because it constitutes a substantial restraint on state control over the individual. It articulates a clear, tradition-proven limit on the coercive power of the State, and marks a boundary of individual accountability to the collective will. It *ensures* that a free man can remain free, by exercising free will. It thus, among other things, prohibits the State, through its embodiment in the insanity defense, from utilizing the criminal law for other purposes than to punish the morally autonomous—i.e., the wicked. As a leading scholar of the defense warns, concerning its abolition:

> If we are to extend state power over individuals to the substantially blameless in an attempt to eradicate their dangerous propensities, we should do so directly and openly under the rubric of a new jurisprudence of preventive confinement rather than indirectly by warping traditional concepts of criminal accountability. The direct approach would focus our attention on the real values at

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[20] *Palko v Connecticut*, 302 U.S. 319, 325 (1937)

issue.[21]

The concept of moral responsibility enhances order because of the obvious truth that an individual's perception of personal responsibility or free will affects his behavior in important ways. Unless it can be shown that the insanity defense and related responsibility defenses do not reinforce the average citizen's belief in his own personal responsibility, then their abolition may well—ironically—*subvert* "law and order." It is perhaps more than merely interesting that each of the modern scholars who have thought seriously about the insanity defense have reached precisely that conclusion.[22]

The concept of personal responsibility, and hence moral culpability, then, may truly be one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"

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[21] *Wales, supra,* 124 U.Pa.L.Rev. at 700-01.

[22] See, e.g., Fletcher, Rethinking Criminal Law (1984), 846:

"[the insanity defense] expresses respect for the autonomy of the sane as much as it shows compassion for the insane. The line between the two may shift over time. Our theories of sanity may change. But the line remains. If the criminal law is to be an institution expressing respect as well as compassion, its institutions must be able both to punish the guilty and excuse the weak. These two sentiments depend on each other. Compassion is possible only so far as punishment is the norm. Punishing wrongdoing is possible only so far as we have a concept of accountability for wrongdoing."

Goldstein, The Insanity Defense, *supra,* 224:

"The insanity defense plays a part in reinforcing the sense of obligation or responsibility. Its emphasis on whether an offender is sick or bad helps to keep alive the almost forgotten drama of individual responsibility. Its weight is felt through the tremendous appeal it holds for the popular imagination, as that imagination is gripped by a dramatic trial and as the public at large identifies with the man in the dock. In this way, it becomes part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society."

See also Wales, *supra,* 124 U.Pa.L.Rev. at 710.

Powell v Alabama, 287 U.S. 45, 67 (1932). If, as this Court stated long ago, "a crime...necessarily involves the possession by the accused of such mental capacity as will render him responsible for his acts," *Davis v United States*, 160 U.S. 469, 485 (1895), it may be that the concept of moral culpability logically implies a system of criminal law wherein the possibility is maintained of establishing nonculpability by showing substantial impairment of a person's capacity for free choice, whether this arises from internal mental disorder, or circumstantial constraint. If so, one would have to agree with the American Bar Association's view that the abolition of the insanity defense is "indefensible... the [social] basis of the mental non-responsibility defense is undeniable, and has been reaffirmed throughout the history of western civilization."[23]

III. The time is ripe for this Court to address the question whether there exist any constitutional strictures respecting the content of the substantive criminal law.

The decision on the question presently presented has, naturally, implications that go far beyond the treatment of insanity in the criminal law. In fact, its implications go to the heart of the criminal law itself. For

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[23] ABA, Criminal Justice Mental Health Standards, Commentary to Section 7.61 [Appendix L]. As pointed out by the ABA Commentary, the insanity defense had become firmly established at the time of the adoption of the American Constitution, and has remained a fundamental part of our criminal law ever since. The only deliberate efforts to eliminate the defense (before the one at issue here) were made early in this century, by the legislatures of Mississippi, Louisiana, and Washington and were all invalidated by state courts on due process or eighth amendment grounds. Otherwise, there is almost no existing precedent on abolition, because, until the Montana legislature abolished the defense in 1979, no legislature had "asked those who administer and apply the law to condemn as criminal the acts of mentally ill defendants who are grossly out of touch with reality."

if the abolition of such a traditional—and important—feature of the "Anglo-American regime"[24] of criminal jurisprudence as the insanity defense is permitted, then it is difficult to see what substantive part or feature of our common law of crimes may not be radically altered or eliminated at the discretion of the legislature. For example: if the affirmative defense of insanity is not required by "generally accepted concepts of basic standards of justice"[25] then surely the affirmative defense of self-defense stands on no sounder footing. Does the constitution permit conviction and long-term incarceration of an individual who, though killing, can demonstrate that he killed to save his own life from unprovoked assault—if only the legislature, for whatever reasons, repeals that most ancient principle of justification?[26] Or, going further: may homicide, for example, be made a strict liability offense, with no showing whatsoever of an actor's awareness of conduct, circumstances, or consequences being required? Does the constitution permit life imprisonment of an individual who, though causing another's death, can show conclusively it was an accident, by no remotest stretch of the imagination his fault? If "the definition of both crimes and defenses is a matter of state law,"[27] unqualified by any possible constitutional strictures, then the answer, again, is: yes.

Though such conclusions may seem shocking to the uninitiated, they could harmonize with the developing intention of this Court's criminal jurisprudence. As

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[24] *Duncan v Louisiana*, 391 U.S. 145, 149-50 fn 14 (1968)

[25] *Leland v Oregon*, *supra*, 343 U.S. at 799.

[26] If there is any equivalency between the defenses, then—assuming the abolition of the insanity defense is allowed—the answer is clearly: yes. That there is an equivalency seems to have been made apparent in *Martin v Ohio*, 480 U.S. 228 (1987), a self-defense case uncannily parallel with *Leland v Oregon* in its doctrine of affirmative defenses.

[27] *Foucha v Louisiana*, *supra*, 112 S.Ct. at 1794 (Kennedy, dissenting).

many commentators, as well as the Court itself have recognized, in over 200 years the "Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v Texas*, 392 U.S. 514, 535 (1968),[28] nor in fact gone any "but a very small way into the substantive criminal law," *id.* at 533.[29] It is entirely possible that this Court really views the Constitution as imposing *no* restraints on any sovereignty, federal or state, in regard to defining the penal law as it sees fit.[30]

On the other hand, in *In re Winship*, 397 U.S. 358, 364 (1970), this Court firmly held, as a matter of *substantive due process*, that criminal liability could only be imposed on an individual after "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[31] This holding was

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[28] "Constitutional acceptance of a requirement of culpability is at best uncertain... In terms of judicial exposition the existence of any constitutional constraints on the substantive criminal law is largely *terra incognita*," Jeffries and Stephan, Defenses, Presumptions and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1366, 1374 (1979).

[29] In *Powell*, the Court interpreted *Robinson v California*, *supra*, as having established that "criminal penalties may be inflicted only if the accused has committed some act which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," *Powell*, *supra*, 392 U.S. at 533. This decision thus seems to have constitutionalized the traditional requirement of an overt act as a prerequisite for the imposition of criminal liability. See, Jeffries and Stephan, *supra*, 88 Yale L.J. at 1371.

[30] If this is so, one may ask with Professor Hart: "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatsoever can be made a crime in the first place?" Hart, *The Aims of the Criminal Law* 23 Law and Contemp. Prob. 401, 431 (1958).

[31] Though a decision regarding a standard of proof could be viewed as procedural in the broadest sense, *Winship* was the first and only case in which this Court has gone beyond selective incorporation of the Bill of Rights, and determined that the due process clause itself created a specific guarantee enforceable against the states.

justified as one safeguarding an "historically-grounded right," as recognizing one of "the fundamental principles that are deemed essential for the protection of life and liberty," *Winship, supra*, 397 U.S. at 362; as "a prime instrument for reducing the risk of convictions based on factual error." *Id*, at 363. Yet, it might be thought that a constitutional standard designed to bias factfinding in favor of the innocent can be effective only if it embodies a constitutional conception of what innocence is. The Court seemed to have this in mind when, some six years after *Winship*, in discussing the States' sweeping prerogatives with respect to defining both crimes and defenses, it said: "But there are obviously constitutional limits beyond which the states may not go in this regard," *Patterson v New York*, 432 U.S. 197, 210 (1977). Since many, if not most, of the relevant problems concerning the definition of crimes and defenses cluster around assessing the "moral accountability of an individual for his antisocial deeds," *Powell, supra*, 392 U.S. at 535-36, *Patterson's* dictum would seem to imply recognition of the need, if not the duty, to determine what the Court said in *Powell* it would be "troubling" to have to determine: "the scope and content of...a constitutional doctrine of criminal responsibility," 392 U.S. at 534. Some day this dilemma will have to be resolved.

Joe Cowan's case could be the appropriate vehicle for resolving it, for the legal unavailability of the insanity defense in a case where the defendant is clearly insane results in the imposition of the gravest personal liabilities on an individual absent proof of meaningful personal fault. In that sense, it crosses the one essential line that should be drawn in the substantive criminal law: the line between moral blameworthiness and unchosen harm. It appears inconsistent with the traditional Anglo-American concept of fairness to the individual to permit any of the coequal sovereigns in our federal system to "cast aside the centuries-long evolution of interlocking... concepts which the common law

[has] utilized to assess the moral accountability of an individual..." *Powell, supra*, 392 U.S. at 535.

When, in *Robinson v California*, this Court did establish that the requirement of an objective act *was* a constitutionally mandated prerequisite for the imposition of criminal liability, it bottomed its holding on the Eighth Amendment, not the due process clause, see *Powell, supra*, 392 U.S. at 533. Since cruel and unusual punishments comprise not only those that are bizarre, but those that are wholly unwarranted, see *Robinson, supra*, 370 U.S. at 667, the Eighth Amendment may be the fitting source for the minimum jurisprudence of the substantive criminal law suggested here. This is so especially in a case involving criminal insanity, for condemning and imprisoning, or executing, the insane as criminals is, in our tradition, "unusual" punishment in the strictest technical sense—it has not been practiced in Anglo-American societies for centuries, nor specifically in the United States since the adoption of the Constitution.[32]

IV. In this case, the Montana Supreme Court upheld a conviction based on a burden-shifting or conclusive presumption equivalent to that found constitutionally deficient in *Sandstrom v Montana*.

Although this Court held, in *Sandstrom v Montana*, 442 U.S. 510 (1979), that a jury instruction embodying the statutory presumption that a person intends the ordinary consequences of his voluntary acts unconstitutionally relieved the prosecution of the burden of proving the intent element of the crime, a similar statutory presumption still applies to all homicide cases in Montana: "knowledge or purpose may be inferred

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[32] See *Harmelin v Michigan*, 111 S.Ct. 2680 (1991), for a most comprehensive analysis of both the historical and proportionality components of the Eighth Amendment.

from the fact that the accused committed a homicide, and no circumstances of mitigation, excuse, or justification appear."[33] In his state appeal, Petitioner Cowan contended that, in view of the extremely strong evidence presented of disorganized, irrational, and manic behavior during the assault, as well as the uncontroverted evidence of serious mental illness, the trial court must have utilized this presumption to find him guilty beyond a reasonable doubt. The Montana Supreme Court apparently agreed,[34] but decided on the merits that the presumption at issue was "permissive," and thus its use did not conflict with *Sandstrom*.

Although it seems clear that this conclusion involves misunderstanding of *Sandstrom* generally,[35] what is more important is the way the presumption was interpreted and used in this particular case of an insane defendant. As the Montana Supreme Court interprets the presumption, "any evidence of organized or integrated conduct may suffice to establish criminal intent," *Cowan*, 861 P.2d at 888. But since the laws of nature demand *some* level of organized or integrated conduct in order to bring about any result in the world, including a harmful one, it follows that intent is automatically established by conduct: if the conduct was organized or integrated enough to permit the doing of harm in the first place, it was—under this interpretation of the presumption—organized or integrated enough to manifest the requisite intent. Furthermore, the evidence of the conduct is logically co-extensive with the evidence which "suffices" to establish the intent. For this reason, the presumption is also virtually irrebuttable.

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[33] Section 45-5-112, Montana Code Annotated.

[34] The Supreme Court ignored the State's contention on appeal that the presumption was not utilized and instead assumed it was, *Cowan, supra*, 861 P.2d at 888.

[35] A presumption which directs or permits the factfinder to presume intent from acts, without more, unconstitutionally shifts the burden of proof, *Sandstrom, supra*, 442 U.S. at 523-24.

The problem is this: there has to be a certain degree of at least partial contact with reality, in order for a person to cause *anything* to happen—whether it be a criminal result, or any other kind of result. An insane person, as well as a sane one, has to understand that you must unlock and open a door to get inside a house, whether it be someone else's house he wishes to enter, or his own—or he will not get in. The very capacity to do harm depends on possessing *some* capacity to act purposely or knowingly, at least at the level of an habitual or unconscious understanding of cause and effect. Insane persons subject to involuntary commitment because they represent "a danger to themselves or others" could not represent any such danger if they did not have the capacity to engage in *some* purposive behavior, like obtaining a sharp knife to cut their own wrists. The subclass of insane persons lacking all capacity to harmonize their motor acts systematically with the material structure of the world, is the class of persons suffering from catatonia—and *these* mentally disordered individuals are never on trial for crimes, because they cannot commit them, being unable to relate systematically to their surroundings in any effective manner.

By statute,[36] Montana purports to permit evidence of a defendant's mental illness to be offered to "prove" that the defendant "did not have a state of mind that is an element of the offense." However, if the trier of fact is permitted to interpret the requisite mental state so that it encompasses any kind of organized or coherent human behavior in any way associated with the doing of the harm that constitutes the crime, then in fact no evidence of mental illness can *ever* "prove" the defendant "did not have" criminal intent—because if the defendant's behavior was harmonious enough with the objective laws of cause and effect to permit him to *do* the harm at

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[36] Section 46-14-102, MCA.

all, then it follows automatically that it was also organized and systematic enough to demonstrate he acted with purpose and knowledge. In this case, the provisions of Section 46-14-102 MCA are nothing but a cruel joke; no one who commits a criminal act can ever be acquitted on grounds of insanity; and the defendant is in a situation where, in fact if not in theory, a conclusive and rigid presumption of intent is operating in every case where insanity evidence is offered, to relieve the prosecution of 100% of its burden to prove criminal intent.[37] *Sandstrom* should apply to this situation as cogently as to one where the operative presumption is more openly stated, rather than having to be deduced.

CONCLUSION

For all of these reasons, and pursuant to U.S. Supreme Court Rule 10.1(c), this decision of the Montana Supreme Court should be reviewed.

Respectfully submitted,

WILLIAM BOGGS
P. O. Box 7881
Missoula, Montana 59807
(406) 728-3088

Counsel of Record for Petitioner

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[37] The present case illustrates precisely how this works. In spite of what can only be described as overwhelming evidence of deranged conduct, in which the picture presented by eyewitnesses of bizarre, senseless, reckless, utterly irrational behavior, fits harmoniously with the clinical picture of paranoid, psychotic, delusional behavior manifesting insanity, the trial Court found that Joe Cowan's conduct was deliberate, and that he "chose" to commit the assault. In the entire record, the only evidence that Joe Cowan "chose" to do what he did is that he did it.

MARGARET L. BORG
Chief Public Defender,
Missoula County
317 Woody Street
Missoula, MT 59802
(406) 721-5700, ext. 3430

Counsel for Petitioner